THE CONSTITUTIONALITY OF FEDERAL LEGISLATION CONCERNING EMPLOYER AND EMPLOYEE ENGAGED IN INTERSTATE AND FOREIGN COMMERCE

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FORE-NOTE.

The primary purpose of this article was to state the theory of Federal legislation concerning the relation of employer and employee. This legislation year by year becomes more important and far reaching in its effects, and, as will be seen, it has already covered a large number of not closely related subjects. Current events seem to predict its wider application in the near future.

The insistent demands of the newer ideals of social justice and responsibility have called for legislation along lines which are quite commonly characterized as revolutionary or socialistic and as wholly subversive of State Rights. The following pages will show, it is believed, that such legislation in its principle is not new, nor revolutionary, but is simply the application of old and well tried principles to the conditions of the present, complex industrial life of the nation.

Were it not so frequently ignored in current discussions and even in the decisions of Federal Courts, it would seem trite to recall that the United States is a nation with complete sovereignty over every foot of American soil for purposes of, not only preserving order and collecting revenue, but of promoting by appropriate legislation, the well-being and safety of citizens engaged in a service under national control and vitally necessary to the welfare and prosperity of the whole nation.

The Federal Constitution cannot be a refuge for the reactionary employer, who seeks under the multiplicity of State laws means of evading plain legal and moral obligations towards employees and towards the public, nor for the lawless Labor Union which finds its opportunity for enforcement of unreasonable demands in the impotence of State governments, the lack of recognized Federal power and the general helplessness of the public.

The Federal power is equal to the demands upon it. It recognizes a National citizenship, with national obligations and duties towards the citizens. It enforces in every part of the Republic, without regard to State lines, legislation necessary to the welfare of the people as a whole, without affecting or lessening the power of the States over purely State questions.

It is believed that the following pages show a consistent theory of national legislation, the application and extension of which will secure the settlement of industrial controversies by the application of long tried legal principles and secure economic justice for employer and employee.

CARL V. WISNER.

Chicago, June 20th, 1907.

THE CONSTITUTIONALITY OF FEDERAL LEGISLATION CONCERNING EMPLOYER AND EMPLOYEE ENGAGED IN INTERSTATE AND FOREIGN COMMERCE

TO what extent does the relation of employer and employee, when engaged in interstate or foreign commerce, come within the regulating power of Congress?

The power of Congress to legislate concerning employer and employee, where the service is rendered in interstate or foreign commerce, has been recently questioned in several important Federal decisions.[1] The ground on which such legislation has been challenged is that it is an attempt by Congress to regulate what is not commerce, that "creating new liabilities growing out of the relations of master and servant on the one hand and regulating commerce on the other are two things so entirely different that confusion of the judicial mind upon them is hardly to be expected under normal conditions. In the opinion of the Court the act does not regulate commerce among the States. While Congress seems to have desired in this instance to exert the power given by the Constitution for that purpose, it in fact regulated something which is not commerce at all."[2]

The important question raised by the group of cases just cited is: Does the regulation of the relation of employer and employee, determining rules of liability in case of accidents, limiting the right to contract, and imposing the performance of duties on those assuming the relation, constitute a proper regulation of commerce by Congress within the meaning of the commerce clause?

By the so-called "Commerce Clause" of the Constitution, together with the enabling clause at the end of the section, it is provided that: "The Congress shall have power,—to regulate commerce with foreign nations, and among the several States * * * and * * * to make all laws which shall be necessary and proper for carrying into execution that power and all other powers vested by the Con-

[1] U. S. *v.* Scott (Oct., 1906), Dist. Ct. W. Dist. Ky., EVANS, J., 148 Fed. 431; Order of R. R. Tel. *v.* Louisville & Nashville Ry. Co. (Nov., 1906), Cir. Ct. W. Dist. Ky., EVANS, J., 148 Fed. 437, holding void § 10 of Arbitration Act of June 1st, 1898; Brooks *v.* So. Pac. Co. (Dec., 1906), Cir. Ct. W. Dist. Ky., EVANS, J., 148 Fed. 986; Howard *v.* Ill. Cent. Ry. Co. (1907), Cir. Ct. W. Dist. Tenn. W. Div., MCCALL, J., 148 Fed. 917, holding Employers' Liability Act unconstitutional. See cases upholding this act: Spain *v.* St. Louis & S. F. R. Co. (March, 1907), Cir. Ct. E. Dist. Ark., TRIEBER, J., 151 Fed. 522; Smead *v.* Central of Georgia Ry. (March 25, 1907), Cir. Ct. S. D. of Ga., E. D. SPEER, J., 151 Fed. 608.

[2] Brooks *v.* So. Pac. Co., in declaring unconstitutional the Employers' Liability Act.

stitution in the government of the United States or in any department or officer thereof."[3]

In accordance with its historical development the subject falls conveniently for discussion under the following general divisions: (1) Legislation by Congress affecting employer and employee engaged in transportation by water; (2) Legislation by Congress affecting employer and employee engaged in railroad transportation; (3) Legislation by Congress regulating hours of labor and (4) Legislation by Congress securing the right of the employee to belong to Labor Unions.

I.

Legislation by Congress Affecting Employer and Employee Engaged in Transportation by Water.

Beginning with the first session of Congress in 1789-1790,[4] Federal laws were enacted regulating the employment of seamen and their relation to employers in commerce and navigation on all navigable waters of the United States. Numerous acts have been passed regulating, among other things, the method and formalities by which contracts of employment between master and seamen should be entered into,[5] the times and conditions under which such contracts might be terminated,[6] the provisions to be made by the employer for the comfort, safety, and convenience of the seamen,[7] for their government and discipline during the employment,[8] and for their protection and maintenance after discharge.[9]

Statutes have been passed by Congress requiring contracts for employment to be entered into before Shipping Commissioners,[10] prohibiting the payment of the wages of seamen in advance,[11] requiring the payment of all wages in gold,[12] requiring the master on termination of the contract to pay wages before a Shipping Commissioner,[13] and to give to the seamen a certificate showing character and time of service,[14] making invalid all assignments of wages by seamen,[15] and prohibiting any attachment, garnishment, or other

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[3] Art. 1, § 8, Federal Constitution.
[4] Act July 20th, 1790, Chap. 29, 1 Stat. at L. 133.
[5] U. S. Rev. St., § 4508 to 4523 inclusive.
[6] U. S. Rev. St., § 4548.
[7] U. S. Rev. Stat., § 4568 to 4572.
[8] U. S. Rev. Stat., 4596 to 4599.
[9] U. S. Rev. Stat., 4579 to 4584.
[10] U. S. Rev. Stat., 4508, and Act June 9th, 1874.
[11] Act Dec. 21st, 1898, Ch. 28, § 10, 30 Stat. at L. 755.
[12] U. S. Rev. Stat., § 4548.
[13] U. S. Rev. Stat., § 4549-4550.
[14] U. S. Rev. Stat., § 4551-4553.
[15] U. S. Rev. Stat., § 4536.

sequestration[16] of wages, and fixing at a nominal sum the amount recoverable against a seaman during the employment.[17]

The regulations above indicated have been sustained by the courts and acquiesced in as a reasonable and proper exercise of the power of Congress to regulate commerce for a hundred years of national life.[18] The power seems never to have been seriously questioned and to have met the needs arising from the character of commerce which chiefly prevailed at the time of the adoption of the Federal Constitution. As changes in the modes of transportation took place, Federal legislation was enacted on this subject to meet the new needs as they arose.

By an Act of Congress passed in 1837,[19] Congress first legislated on the subject of liability for injuries in accidents occurring in commerce by water. The act was entitled, "An Act to Provide for the Better Security of the Lives of Passengers on Board of Vessels Propelled in Whole or in Part By Steam." Section 13 of the Act provided that in all suits and actions against proprietors of steamboats, for injuries arising to person or property from the bursting of the boiler of any steamboat or the collapse of a flue or other injurious escape of steam, the fact of such bursting of steampipe or escape of steam should be taken as full prima facie evidence sufficient to charge the defendant or those in his employment with negligence until he should show that no such negligence was committed by him. This act was sustained as a reasonable exercise of the power to regulate commerce.[20]

Acts requiring the examination and licensing of engineers, pilots, and officers of vessels employed on the navigable waters of the United States as a pre-requisite to their employment have been upheld as a proper exercise of the power of Congress over commerce.[21]

By an Act of Congress amended in 1890, every master of vessel of the United States was required to retain forty cents per month from the wages of each able bodied seaman which was to be paid by the master into the fund for the Hospital for Disabled Seamen, being in the nature of compulsory sick benefit.[22]

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[16] U. S. Rev. Stat., § 4536.

[17] U. S. Rev. Stat., § 4537.

[18] Leroy *v.* U. S. (1900), 177 U. S. 632; White's Bank *v.* Smith (1868), 7 Wall. (U. S.) 650; In re Garret (1891), 141 U. S. 12; Wiggins Ferry Co. *v.* East St. Louis (1882), 107 U. S. 375; State Tonnage Tax Cases (1870), 12 Wall. (U. S.) 216; Sherlock *v.* Alling (1876), 93 U. S. 103.

[19] Act July 7th, 1838, 5 Stat. at L. 304.

[20] Bradley *v.* Northern Transportation Co. (1864), 15 Ohio St. 556; Houston, etc. Navigation Co. *v.* Duyer (1867), 29 Texas 382.

[21] Cooley *v.* Board of Wardens (1851), 12 How. (U. S.) 315.

In the decision of the first of the great interstate commerce cases in 1824,[23] the Federal Supreme Court said, speaking through Mr. Chief Justice Marshall, "All America understands and has uniformly understood the word 'commerce' to comprehend navigation. It was so understood and must have been so understood when the Constitution was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it."

In the case of *The Daniel Ball* v. *United States,*[24] proceedings were brought for the condemnation of the vessel on the ground that she was not enrolled and licensed in accordance with the Act of Congress relating to vessels engaged in commerce.[25] It was shown that the vessel was used exclusively on the Grand River and wholly within the limits of the State of Michigan, that she was in part engaged in carrying goods destined for places outside of Michigan. It was held that the vessel was engaged in interstate commerce and was within the meaning of the acts of Congress requiring enrollment and licensing of such vessels. The vessel was condemned and forfeited to the United States for failure to comply with the acts in question. The Federal Supreme Court in that case, speaking by Mr. Justice Field, stated the extent of power of Congress over commerce by water:

"That power authorizes all appropriate legislation for the protection or advancement of either interstate or foreign commerce and for that purpose such legislation as will ensure the convenient and safe navigation of all the navigable waters of the United States, whether that legislation consists in requiring the removal of obstructions to their use, in prescribing the form and size of the vessels employed upon them, or in subjecting the vessels to inspection and license, in order to insure their proper construction and equipment. The power to regulate commerce this Court said in *Gilman* v. *Philadelphia,* comprehends the control for that purpose and to the extent necessary of all navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation of Congress."

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[22] Sec. 4584-4587, Rev. Stat. U. S.

[23] Gibbons *v.* Ogden (1824), 9 Wheat. (U. S.) 1; s. c., 6 L. Ed. 23.

[24] The Daniel Ball *v.* United States (1870), 10 Wall. (U. S.) 577, s. c. 77 (U. S.), 19 L. Ed. 999.

[25] Act July 7th, 1838, 5 Stat. at L. 304, and Act Aug. 30, 1852, 10 Stat. at L. 61.

In reply to the argument that the vessel was employed exclusively within the waters of the State of Michigan and therefore not subject to the control of Congress, the Court said:

"Whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced. The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one State, and some acting through two or more States, does in no respect affect the character of the transaction. To the extent in which each agency acts in that transportation it is subject to the regulation of Congress."

In *Gilman* v. *Philadelphia*[26] it was held that all the powers which existed in the States before the adoption of a national Constitution and which have always existed in the Parliament of England are the powers possessed by Congress over navigable waters under its authority to regulate commerce.

The enactment of the legislation referred to is justified under the power to regulate commerce. Under the commercial power, contracts with seamen are regulated for the purpose of securing the full and safe carrying-on of commerce by water. Whenever the contract is for employment in commerce not wholly within the waters of a State, it comes within the regulating power of Congress, which is charged with the duty of protecting that commerce. For the purpose of regulation those waters are the public property of the nation and subject to all the requisite legislation of Congress.

Enough has been said to show that Congress has legislated in a great variety of ways concerning the relation of employer and employee engaged in commerce by water, and that this legislation has been enacted and sustained in its varying character under the grant of power to regulate commerce. Beyond question Congress has accepted as a legitimate means of regulating commerce by water the control of the relation of employer and employee, the regulation of the terms and conditions of the contract entered into, so far as they affect the public interest, and the regulation of all matters directly affecting the health, life, comfort, and welfare of employees, and this power as exercised has been uniformly sustained by the courts.[27]

We come now to the exercise of the same power in essentially the same way over another means of transportation, and over those engaged therein, in so far as is essential to their protection and the protecting of those seeking transportation.

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[26] Gilman *v.* Philadelphia (1865), 3 Wall. (U. S.) 725.

[27] Patterson *v.* Bark Endora (1903), 190 U. S. 173.

II.

Legislation By Congress Affecting Employer and Employee Engaged In Railroad Transportation.

It has been shown how fully Congress has regulated the relation of employer and employee engaged in commerce by water, where it seemed necessary.

The enactment of the Interstate Commerce Act in 1887, and the creation of the Interstate Commerce Commission, grew out of the chaotic condition of interstate railroad transportation then existing.[28] It was designed primarily for the protection of the shipper and the public.

The report of the Interstate Commerce Commission for 1892, brought to the attention of Congress the necessity of some regulation to prevent accidents on railroads. In that report it was said:[29]

"The figures in this report emphasize more strongly than any previous report the necessity of legislation compelling railways to adopt train-brakes and automatic couplers, and also suggest that some steps be taken to prevent the frequency of casualties from falling from trains and engines. The large number of killed and injured from collisions also brings prominently into view the necessity of a more extensive use of the block system of handling trains and a more perfect application of the principle of responsibility in case of accidents."

In response to the persistent demands of public opinion, Congress, in 1893,[30] enacted the so-called Safety Appliance Law, which was made applicable to the equipment of cars on railroads engaged in interstate and foreign commerce. The purpose as shown by the title of the Act was, "To promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving wheel brakes."

The act makes it unlawful for any common carrier engaged in interstate commerce by railroad to use on its line in moving interstate traffic any locomotive not equipped with a power driving wheel brake, and requires that the train must be so equipped as to be controlled by the engineer; that cars must be used with couplers which couple automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars. Grab

[28] Act. Feb. 4th, 1887, ch. 104, 24 Stat. at L. 379; Interstate Commerce Commission *v.* Baltimore & Ohio R. Co. (1892), 145 U. S. 263.

[29] 6 Annual Report Interstate Commerce Commission, 73.

[30] Act March 2nd, 1893, 27 Stat. at L. 531, 2 Supp. to Rev. Stat. 102.

irons and hand-holds in the ends and sides of each car are required for the greater security of men in coupling and uncoupling the cars. Severe penalties are provided for violation of the act.

Section 8 of the Act provides:—

"That any employee of any such common carrier who may be injured by any locomotive, car, or train, in use contrary to the provisions of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car or train had been brought to his knowledge."

Congress as a means of enforcing this act, in effect provided in addition to the penalties for its violation that a common carrier which had not complied with the provisions of the act could not when sued by an injured employee avail itself of the doctrine of assumed risk as a defense to such suit.[31]

In a recent case[32] the Federal Supreme Court in construing this act (and upholding it), speaking through CHIEF JUSTICE FULLER, said:

"The primary object of the act was to promote the public welfare by securing the safety of employees and travelers, and it was in that aspect remedial. * * * The risk in coupling and uncoupling was the evil sought to be remedied, and that risk was to be obviated by the use of couplers coupling automatically. * * * That this was the scope of the statute is confirmed by the circumstances surrounding its enactment as exhibited in public documents to which we are at liberty to refer. * * * President Harrison in his annual messages of 1889, 1890, 1891 and 1892, earnestly urged upon Congress the necessity of legislation to obviate and reduce the loss of life and the injuries due to the prevailing method of coupling and braking. In his first message he said: 'It is competent, I think, for Congress to require uniformity in the construction of cars used in interstate commerce, and the use of improved safety appliances upon such trains. * * * It is a reproach to our civilization that any class of American workmen should in the pursuit of a necessary and useful vocation be subjected to a peril of life and limb, as that of a soldier in time of war.' * * * Statistics furnished by the Interstate Commerce Commission show that during the year ending June 30th, 1891, there were forty-seven different styles of car couplers reported to be in use, and that during the same period there were 2,660 employees killed and 26,140 injured. Nearly 16 per cent of

[31] Kansas City etc. R. Co. *v.* Filippo (1903), 138 Ala. 487.
[32] Johnson *v.* Southern P. Co. (1904), 196 U. S. 1, 49 L. Ed. 363.

the deaths occurred in the coupling and uncoupling of cars, and over 36 per cent of the injuries had the same origin."

Reference to the reports of the Interstate Commerce Commission for the years following the enactment of this statute shows the constant need of protection from railway accidents, both for the employee and for the traveler, and the increasing demand therefor.[33]

In 1896[34] the Safety Appliance Act was amended, so as to except from its operation logging trains, and in 1903[35] Congress further amended the Act and broadened its scope by providing that its provisions should apply to common carriers by railroads in the territories and in the District of Columbia, and should apply in all cases whether or not the couplers brought together were of the same make or type or not, and required that its provisions should apply to "all trains, locomotives, tenders, cars, and similar vehicles used in connection therewith."

By the express terms of the Safety Appliance Act, the burden of its enforcement was placed upon the Interstate Commerce Commission, and a subsequent act provided for the employment by the Commission of Inspectors to see that the Act was complied with.[36]

That the Safety Appliance Act is *in pari materia* with the Interstate Commerce Act and must be construed in the light of its evident purpose was held, in the recent case of *United States* v. *Geddes*.[37] The Circuit Court of Appeals for the 6th Circuit, speaking by Circuit Judge Richards, said:

"It is vigorously insisted that the acts are not *in pari materia* and that Congress by the use of the broader terms in the later act intended a wider application of its provisions. In one sense the two acts are *in pari materia*. In another they are not. Both relate to the regulation of commerce among the States under the supervision of the Interstate Commission. The first deals largely with rates and fares—the cost of the commerce; the second with locomotives and cars—the instrumentalities used in carrying it on. The first was intended primarily to protect shippers, the second, railroad employees; both ultimately to promote the best interests of the public. In each act Congress seeks to regulate commerce. What commerce? Commerce among the several States. It was desirable,

[33] 1894, pages 74-76; Report of 1895, page 55; Report of 1896, pages 99, 100; Report of 1897, page 80; Report of 1898, pages 77-89; Report for 1899, pages 54, 57, 62, 63; Report of 1900, pages 73, 78.

[34] Act April 1st, 1896, 29 Stat. at L. 85, 2 Sup. Rev. Stat. 465.

[35] Act of March 2nd, 1903, 32 Stat. at L. 943.

[36] Act of June 28th, 1902, 32 Stat. at L. 444.

[37] U. S. *v.* Geddes (1904), C. C. A. 6th Cir. Before Lurton, Severens and Richards, Cir. Judges, 131 Fed. 452.

therefore, in the first act to define that commerce. Having done this once, it was sufficient in the second act to apply its provisions to 'carriers engaged in interstate commerce' adopting the provisions of the first."

In numerous cases the validity of the Safety Appliance Act as amended has been sustained.[38]

By the Act of March 3rd, 1901,[39] it is made the duty of the General Manager, Superintendent, or other proper officer of every common carrier engaged in interstate commerce by railroad, to make monthly reports under oath of all collisions of trains or where any train or part of a train accidently leaves the track, and of all accidents which may occur to its passengers or employees while in the service of such common carrier and actually on duty, and the report is required to state the nature and causes of the accidents and the circumstances connected therewith. Penalties are prescribed for failure to make the reports, and the duty of receiving the same and compelling their being made is imposed on the Interstate Commerce Commission.

In its annual reports to Congress, the Interstate Commerce Commission, in performing the duties imposed upon it by the act just referred to, has again and again recommended legislation which would lessen the danger to men employed in train service in interstate commerce. In its report for 1900[40] the Commission said:

"The attention of Congress has often been called to the serious loss of life and limb attendant upon travel and service in the operation of railways * * * to the end that every precaution may be taken and that careless or indifferent, ignorant, or selfish individuals may not be permitted to endanger their fellows, a system of public supervision should be maintained and a close inspection made of the rolling stock in service. * * * During the year ending June 30th, 1899, there were 51,743 accidents on the railroads of the United States. Of that number 37,133 were to employees, including 2,221 killed."

In the annual report for 1901,[41] attention is called to the reduced number of accidents due to the enforcement of the safety appliance law. In the annual report for 1902,[42] the necessity for the general adoption of the block signal system throughout the railways of the

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[38] Chicago, Milwaukee & St. Paul Ry. *v.* Vorlkee (1904), C. C. A. 9th Cir. Before SANBORN, THAYER and VAN DEVANTER; opinion by VAN DEVANTER, 129 Fed. Rep. 522, C. C. A. Rep. ——; Southern Ry. Co. *v.* Carson (1903), U. S. Sup. Ct. Opinion by C. J. FULLER, 194 U. S. 136; Johnson *v.* Southern Pac. Co., supra.

[39] Act of March 3rd, 1901, 31 Stat. at L. 1446.

[40] 14 Annual Interstate Commerce Com. Rep., 79.

[41] 15 Annual Interstate Commerce Com. Rep., 62.

nation is shown, and the fact that the number of accidents shows no decrease over the preceding years is called to the attention of Congress with the earnest recommendation that some steps be taken to lessen the frequency of such accidents. Comment is made on the fact that many railway accidents are shown to be due to excessive hours of labor for employees, and on the fact that the work of operating trains requires a high degree of mental and physical vigor. The fact that overwork of men is a matter of gravity both for employees and public is pointed out.

In the annual report for 1903,[43] attention is again called to the fact that the number of inexperienced employees has greatly increased, and that the increase in the number of inexperienced men employed is followed by increase in the number of accidents. It was said:

"New men ought to be at first employed at such places and in such departments of the work as are least dangerous to those who are experienced."

Attention was called to the fact that in many accidents due to fault of telegraphers the men employed were under 21 years of age. Positions of that kind, it was declared, should be filled only by matured and experienced men. Adoption and use of the block system in the United States was recommended. An Act drafted to that effect to be submitted to Congress, accompanied the report.

The annual report for 1904[44] again recommends the adoption of the block system as a means for preventing railroad accidents, and calls attention to the increasing frequency of accidents to men employed in railway transportation. The appointment of a railway inspector to investigate railway accidents as a means of determining the causes thereof is recommended. It was said:

"The collisions that caused deaths by the score and aroused the indignation of the whole world are due to causes which figure in the records every month. The question at issue is the abolishment of these causes. * * * The part played by excessive hours of labor in causing railroad accidents is a question that calls for serious consideration. * * * If there is a reason for limiting the hours of labor in any employment, it applies with peculiar force to the operation of railroad trains, since the safety of the traveling public is so largely dependent on the alertness and intelligence of train employees."

In the report for 1905[45] the adoption of the block system is again

[42] 16 Annual Interstate Commerce Com. Rep., 66.
[43] 17 Annual Report Interstate Commerce Com., 68, 69.
[44] 18th Annual Report Interstate Commerce Com., 104.

urged and a Federal law providing for the inspection of all accidents is recommended. Attention is again called to the fact of overwork on railroads of employees and the delicate and responsible duties with which they are charged, and to the fact that new and inexperienced men are often the ones overworked.

The annual report for 1906[46] again called attention to the necessity for some radical action looking to the lessening of accidents and deaths on railroads engaged in interstate commerce. It was said:

"The statistical tables contain no new lessons. They only serve to confirm, where confirmation is scarcely needed, the serious and pressing character of the three-fold problem which has been made the chief feature of this department in our last two or three annual reports; (1) the investigation of accidents; (2) the requirement by law that the block system should be used on passenger lines; and (3) the regulation by governmental authority of the evil of overwork by train men, signal men, and telegraph operators. We can but urge with all possible emphasis that Congress consider these questions without delay."

The number of killed and injured of the employees of railroads for the years 1903-1904-1905 and 1906 is summarized on page 73 of the 1906 Report. It shows that for 1903, there were employees killed, 2,333; employees injured, 39,004; for 1904, employees killed, 3,367; employees injured, 43,266; for 1905, employees killed, 3,261; employees injured, 45,426; for 1906, employees killed, 3,807; employees injured, 55,524.

The comment of the Commission as to the number of killed and injured in railway operation is sufficiently forceful to illustrate the points sought to be made in this article, as to the necessity evidently recognized by Congress of legislation for the protection of employees on railroads engaged in interstate commerce. It was said on page 69:

"The ratio of casualties indicates that one employee in every 411 was killed and one employee in every 21 was injured. With regard to train men—that is, engine men, firemen, conductors, and other train men—it appears that one train man was killed for every 133 employed, and one was injured for every nine employed."

On June 11, 1906,[47] Congress passed the so-called Employer's Liability Act. The Act was entitled, "An Act Relating to Liability of Common Carriers in the District of Columbia and Territories, and Common Carriers Engaged in Commerce Between the States

[45] 19 Annual Report Interstate Commerce Com., Rep. 78.
[46] 20 Annual Report Interstate Commerce Com., Rep. 74.
[47] Act June 11, 1906, 34 Stat. at L. 232, 234.

and Between the States and Foreign Nations to Their Employees."

The act by its terms applies to every common carrier engaged in interstate trade or commerce, first, in the District of Columbia, or any territory of the United States; second, between the several States; third, between any territory and another; fourth, between any territory or territories and any State or States, or the District of Columbia, or with foreign nations; fifth, between the District of Columbia and any State or States or foreign nations.

It was provided that any such common carrier shall be liable to any of its employees for all damages which may result from the negligence of any of its officers, agents, or employees, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, road-beds, ways, or work.

Section 2 provides that in all actions against any common carrier to recover damages for personal injuries to employees, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery where his contributory negligence was slight, and that of the employer was gross in comparison; but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee, all questions of negligence and contributory negligence to be for the jury.

Section 3 provides that no contract of employment, insurance, relief, benefit or indemnity, for injury or death entered into by or in behalf of any employee, nor the acceptance of any such insurance or benefit by the person entitled to it, shall constitute any bar or defence to any action brought to recover damages for personal injuries to or death of such employee.

The Act expressly provides that nothing therein contained shall be held to limit or impair the duty of common carriers by railroads or the rights of their employees under the safety appliance act already referred to.

The Act seeks the following changes in the relation of common carriers and their employees while engaged in commerce as therein defined: first, to abolish the common law fellow servant rule; second, change the common law rule as to contributory negligence in cases of personal injury of employees; third, render void all contracts between employer and employee to avoid the liability fixed by the act, or waiving rights given to the employee therein; fourth, to abolish the common law rule as to employee accepting the risks of employment.

That Congress is entrusted with a wide discretion as to the means it shall adopt to regulate commerce has been established beyond question:

"Let the end be legitimate, let it be within the scope of the Constitution and means which are appropriate, which are plainly adapted to that end, which are not prohibited but consist with the letter and spirit of the Constitution, are Constitutional."[48]

It is a familiar rule of statutory construction that the evil sought to be remedied and the circumstances surrounding its enactment are to receive serious consideration in its construction.[49] What was the evil sought to be remedied by this act of Congress? It has been shown that Congress as early as 1838 passed an act fixing the presumption of negligence on the vessel owner in case of certain accidents; that in 1893 the safety appliance act for the purpose of providing greater security for passengers and employees in interstate commerce was enacted; and that this act has subsequently been amended to meet new conditions, and acts have been passed to facilitate its enforcement; that in 1901 the collection of monthly accident statistics was required of the Interstate Commerce Commission. Subsequent acts provided for a system of block signals to be installed on railroads in the territories of Oklahoma and the Indian Territory,[50] under the direction of the Interstate Commerce Commission; and a recent joint resolution of Congress required the Interstate Commerce Commission to investigate and report on the use and necessity for block signal systems and appliances for the automatic control of railway trains in the United States.[51] The need of legislation, as shown by the investigation of the Interstate Commerce Commission, has been shown by quotations from the annual reports of that body. It is clear that the legislation mentioned shows a purpose on the part of Congress to secure such regulations of those engaged in interstate and foreign commerce as will, if possible, lessen the danger to both life and limb of passengers and employees, and compel the provision of better equipment, the more careful selection of competent employees, the more thorough inspection and adoption of means and devices to prevent accidents.

It is not the purpose of this article to analyze the decisions of the various district and circuit courts construing the legislation already referred to, but to point out the principles which the writer believes control the subject, and show the purpose of this class of legislation and its constitutional justification.

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[48] McCulloch *v.* Maryland (1819), 4 Wheat. (U. S.) 122, at p. 421, s. c. 4 L. Ed. 529.

[49] U. S. *v.* Harris (1900), 177 U. S. 309; Johnson *v.* Southern Pac. Ry. Co. (1904), 196 U. S. 1.

[50] Act Feb. 28, 1902, 32 Stat. at L. 50.

[51] Act of June 30, 1896, 34 Stat. at L.

Congress undoubtedly has power to legislate to such an extent on this subject as will effectuate the objects sought to be accomplished, which, in this case, are the security of greater caution in the selection of employees, the employment of better equipment, the more careful inspection of the equipment employed, and the more careful operation of all the equipment now in use in transportation.[52]

A rule of law enforcing duties between individuals engaged in a business affected with the public interest, as a means of securing a regulation due to the public, is always a legitimate exercise of legislative power.[53] Manifestly it would be impossible to prescribe the character of equipment, the hours of labor, the conditions of operation of trains, the experience of employees, and the positions they should fill before being entrusted with certain kinds of work, and the great mass of details incident to the business of transportation by railroad. That result is sought to be accomplished by throwing such a burden on the employer as will make it to his interest and duty to exercise precautions that will reduce accidents to the minimum.

That the act be broad in its application and include practically all the employees of a railroad company which does any interstate business, is manifestly necessary. Of what advantage would it be to regulate the relations and the conduct of the engineer and conductor on a train if the train dispatcher or switchman were governed by a different rule in relation to the same traffic? Of what advantage would regulations of a brakeman operating trains be if the chairman of the board of directors of the railway system, with power over the whole body of men employed, were not subject to the rule of Federal legislation?

The language of Mr. Justice Field in the case of the *United States* v. *Daniel Ball,* before cited, and analyzed, is particularly applicable here to the question of the extent of the subject covered by the regulating power of Congress:

"The fact that several different and independent agencies are employed in transporting a commodity, some acting entirely in one State and some acting in two or more States, does in no respect affect the character of the transaction. To the extent to which each agency acts in that transportation it is subject to the regulation of Congress."[54]

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[52] See decision of court in Johnson *v.* Southern Pac. R. Co., supra.

[53] Munn *v.* Illinois (1877), 94 U. S. 113; Holden *v.* Hardy (1898), 169 U. S. 366.

III.

Legislation by Congress Regulating Hours of Labor of Employees Operating Railroad Trains.

We have already shown that the attention of Congress has again and again been called to the subject of extended hours of labor of men engaged in interstate transportation by the Interstate Commerce Commission.

Legislation by Congress limiting the hours of labor of working men, laborers and mechanics employed by or on behalf of the government of the United States, occupied the attention of Congress as early as 1868.[55] That act served largely as a declaration of policy by Congress on the subject of long hours of labor for working men. It was held to be directory merely and did not require a contractor or subcontractor to conform to the eight-hour period of labor prescribed by the statute.[56]

By the act of March 30, 1888,[57] eight hours per day were fixed as the maximum time for persons employed in the government printing office.

By act of May 24, 1888,[58] Congress provided that eight hours should constitute a day's work for letter carriers in cities or in postal districts connected therewith. By the act of August 1, 1892,[59] the employment of all laborers and mechanics upon any of the public works of the United States or of the District of Columbia was restricted to eight hours in one calendar day. Penalties were provided for any violation of the act.

Congress by an act approved March 4, 1907,[60] entitled, "An Act to Promote the Safety of Employees and Travelers upon Railroads by Limiting the Hours of Service of Employees Thereon," has taken a further step in regulating the relation of employee and employer in interstate and foreign commerce. The act makes it unlawful for any common carrier, its officers or agents, subject to the act, to require or knowingly permit any employee actually engaged in or connected with the movement of trains to be or remain on duty for a longer period than sixteen consecutive hours. Whenever such

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[54] The Daniel Ball *v.* U. S. (1870), 10 Wall. (U. S.) 77.
[55] Sec. 3738, Rev. Stat. U. S., Act June 25th, 1868.
[56] U. S. *v.* Martin (1876), 94 U. S. 404.
[57] 25 Stat. at L. 47.
[58] 25 Stat. at L. 157, Chap. 308.
[59] 27 Stat. at L. 340, Chap. 352.
[60] Railway Age, March 8th, 1907, p. 323.

employee has been continuously on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty. No employee who has been on duty sixteen hours in the aggregate in any twenty-four-hour period, shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty, unless immediately prior to the twenty-four-hour period such employee had at least eight consecutive hours off duty, and during said period of twenty-four hours following had at least six consecutive hours off duty. No operating train dispatcher or other employee who by the use of the telegraph or telephone dispatches reports, transmits, receives, or delivers orders pertaining to or affecting any train movements, shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four-hour period, in all towers, offices, places and stations continuously operated day and night, nor for a longer period than thirteen hours in all such towers or stations operated only during the day time, except in cases of emergency, when the employee may be permitted to remain on duty for four additional hours in a twenty-four hour period on not exceeding three days in any week.

Common carriers requiring or knowingly permitting any employee to violate the act is liable to a penalty of not to exceed five hundred dollars for each offence. In all prosecutions under the act, the common carrier is deemed to have had knowledge of all acts of its officers or agents.

The act is not to apply to any case of casualty or unavoidable accident, or the act of God, nor where the delay was the result of a cause not known to the carrier, its officers or agents in charge of such employee at the time such employee left a terminal, and which could not have been foreseen. The provisions of the act do not apply to the crews of wrecking or relief trains.

By the terms of the act, it is made the duty of the Interstate Commerce Commission to execute and enforce its provisions and all powers granted to the Interstate Commerce Commission are extended to it in execution of the act.

It is the duty of the commission to lodge with the proper U. S. District Attorney information of violations of the act.

The constant reports of accidents on interstate railroads with appalling loss of life, due in many cases to the fact that employees in control of train operations were often required to work excessive hours without rest, undoubtedly had its effect on Congress. The

frequent recommendations of the Interstate Commerce Commission on this subject have already been referred to.

The limitation of hours of labor by government in employments affected with a public interest, and in those dangerous to health and life, has been sustained by the Federal courts,[61] under the inherent power of all governments to legislate for the protection of health, morals, and the general welfare of the people. In the leading Federal case[62] on this subject, it was said:

"This right of contract, however, is itself subject to certain limitations which the State may lawfully impose in the exercise of its police powers. While this power is inherent in all governments, it has doubtless been greatly expanded in its application during the past century, owing to an enormous increase in the number of occupations which are dangerous, or so far detrimental to the health of employees as to demand special precautions for their well-being or protection, or the safety of adjacent property."

A statute of the State of Utah limiting the hours of labor in mines and smelters to eight hours per day was held to be valid by the Federal Supreme Court as a reasonable means of protecting the well-being of the class employed. That reasons for limiting hours of labor because of the public nature of the employment apply with peculiar force to employees engaged in railroad transportation, has been shown by quotation from the Report of the Interstate Commerce Commission for 1904. The case of *Johnson* v. *Southern Pacific Railway Co.*,[63] already quoted from herein, sustains the regulation of the equipment of common carriers on the same theory of protection to lives of men employed, and uses as an additional argument in its favor, the public interest in the safe and efficient management of railroad trains.

This act limiting the hours of labor has not, of course, been tested by the courts, since by its terms it does not go into effect until March 4, 1908. But it seems to be in entire harmony with the safety appliance acts and the Interstate Commerce Act, which have met the approval of the courts, and with the acts to regulate employer and employee engaged in commerce by water. It is a very fitting part of the general plan of legislation adopted by Congress looking toward the safeguarding of the interests of the traveling public, and of the men employed in railway transportation.

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[61] Holden *v.* Hardy (1898), 169 U. S. 366; see also St. Louis Consolidated Coal Co. *v.* Illinois (1902), 185 U. S. 203; Lochner *v.* New York (1905), 198 U. S. 45, where cases are collected and discussed.

[62] Holden *v.* Hardy (1898), 169 U. S. 366.

[63] (1904) 196 U. S. 1.

IV.

Legislation by Congress Relating to Union Labor and Adjustment of Disputes Between Common Carrier and Employee.

Examination of the Acts of Congress touching this subject shows that the recognition of the principle of Union Labor as a means of dealing with working men as groups, and as a means of promoting the material welfare, has received considerable attention from Congress.

By the act of June 27, 1884,[64] Congress created a Bureau of Labor.

By the act of June 29, 1886,[65] Congress provided for the incorporation of National Trade Unions, "for the purpose of aiding members to become more skillful and efficient workers, the promotion of their general intelligence, the elevation of their character, the regulation of their wages and hours of labor and conditions of labor, the protection of their individual rights in the prosecution of their trade or trades, the raising of funds for the benefit of sick, disabled or unemployed members, or the families of deceased members, or for such other objects for which working people may lawfully combine, having in view their mutual protection and benefit."

Powers were given to hold real estate necessary for corporate purpose, and to exercise all the usual powers of a corporation.

By the act of June 13, 1888,[66] the department of labor was established, and the office of Commissioner of Labor was created. The act was entitled "An Act to Establish a Department of Labor." "The general design and scope shall be to acquire and diffuse among the people of the United States useful information on subjects connected with labor in the most general and comprehensive sense of that word, and especially on its relation to capital, the hours of labor, the earnings of laboring men and laboring women, and the means of promoting their material, social, and intellectual prosperity."[67]

Section 7 of the act provided, "The Commissioner of Labor is also especially charged to investigate the causes and facts relating

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[64] 23 Stat. at L. 60.

[65] 24 Stat. at L. 86; 1 Supp. Rev. Stat. 498.

[66] 25 Stat. at L. 182; 1 Supp. Rev. Stat. 590.

[67] By Act of Feb. 14th, 1903, 32 Stat. at L. 825, the Department of Commerce and Labor was created under charge of the Secretary of Commerce and Labor, who by the Act was made a member of the Cabinet, and all matters pertaining to Commerce and Labor grouped under this Department.

to all controversies and disputes between employer and employee as they may occur, and which may tend to interfere with the welfare of the people of the different States, and report thereon to Congress."

By the act of October 1, 1888,[68] Congress first legislated on the subject of adjustment of controversies between carriers and their employees, and in that act recognized the principle of dealing with the organizations representing the employees as well as with the employers. By the terms of that act Boards of Arbitration to consist of men selected both by the employing railroad and its employees, were created with power to investigate differences between employers and employees. The boards were to have the powers of United States Commissioners to subpoena witnesses, and to take testimony. The decisions were to be publicly announced and filed with the Commissioner of Labor. The expenses of investigation were to be paid out of the treasury of the United States. Power was given the President by the Act to appoint two Commissioners who, with the Commissioner of Labor, were to constitute a temporary commission to examine the causes of a particular controversy and report their conclusions to the President and Congress. The Commissioner of Labor was to be ex officio chairman of the Commission, and to establish rules governing its action.

By the act of June 1, 1898,[69] the Arbitration Act just referred to was repealed, and the "Act concerning carriers engaged in interstate commerce and their employees," was enacted. The provisions of this Act were made to apply "to any common carrier or carriers and their officers, agents and employees, except masters of vessels and seamen * * * engaged in the transportation of passengers or property wholly by railroad or partly by railroad and partly by water for a continuous carriage or shipment," in interstate or foreign commerce.

The term "railroad" was made to include all bridges and ferries used or operated in connection with any railroad, and also all roads used by any corporation operating a railroad, whether operated under contract, agreement, or lease, and the operating carrier was made responsible for the acts and defaults of persons actually engaged in train operation or train service to the same extent as though the cars were owned by it, and the employees directly employed by it.

The term "employees" was made to include all persons actually

[68] 25 Stat. at L. 501, 1 Sup. Rev. Stat. U. S. 622.

[69] 30 Stat. at L. 424, 2 Sup. Rev. Stat. 769.

engaged in any capacity, in train operation or train service of any description. This notwithstanding that the cars upon which or in which they may be employed are operated by the carrier under lease or other contract.

By § 2 of the Act it was provided that when a controversy arose concerning wages, hours of labor, or conditions of employment between a carrier subject to the Act and the employees of the carrier, seriously interrupting or threatening to interrupt the business of the carrier, the Chairman of the Interstate Commerce Commission, and the Commissioner of Labor shall, at the request of either party to the controversy, use their best efforts by mediation and conciliation to amicably settle the controversy. If their efforts are unsuccessful they shall at once endeavor to bring about arbitration by submitting the controversy to three persons, one named by the employer, the other by the employees, and the third by the two first named. In case the two first named cannot agree, the Commissioner of Labor and the Chairman of the Interstate Commerce Commission are to select the third arbiter. Power is given the arbitrators to take testimony and summon witnesses. The award and the testimony are to be filed in the Clerk's office of the Circuit Court for the District in which the controversy arises, and are to be final and conclusive on both parties unless set aside for error of law apparent on the record.

The act, however, provides that no employee shall be compelled to render personal service without his consent, and that no injunction or other legal process shall issue which shall compel the performance by the employee against his will of a contract for personal service.

The arbitrators have power to administer oaths, require the attendance of witnesses, and the production of books, papers, and contracts, to the same extent and under the same conditions and penalties as is provided for in the Act to Regulate Commerce, commonly known as the Interstate Commerce Act.[70] It must appear to the Chairman of the Interstate Commerce Commission that the agreement to arbitrate represents the majority of all employees in the service of the same employer and of the same grade and class, and that the award pursuant to said commission shall be justly binding upon all employees.

Section 9 of the Act provides that where railroads are in the hands of receivers of the Federal Courts employees upon such railroads shall have the right to be heard upon all questions affecting

[70] Act of Feb. 11th, 1893; 27 Stat. at L. 443; 2 Sup. Rev. Stat. 80; Act June 30th, 1906, 34 Stat. at L.

the terms and conditions of their employment, and no reduction of wages is to be made by such receivers without the authority of the court upon at least twenty days' notice publicly posted for all employees affected by the change.

Section 10 of the Act provides that every employer subject to the provisions of the act, and any officer, agent, or receiver of such employer, shall be guilty of a misdemeanor and for each offence shall be punished by a fine of not more than $1,000, who shall: 1st, require any employee or any person seeking employment as a condition of such employment to enter into an agreement, either written or verbal, not to become or remain a member of any labor corporation or association or organization; 2nd, threaten any employee with loss of employment, or shall unjustly discriminate against any employee because of his membership in such labor corporation or organization; 3rd, shall require any employee or any person seeking employment as a condition of such employment to enter into a contract whereby such employee or applicant for employment shall agree to contribute to any fund for charity, social, or beneficial purposes, to release such employer from legal liability for any personal injury by reason of any benefit received from such fund beyond the proportion of the benefit arising from the employer's contribution to such fund; 4th, who shall, after having discharged an employee, attempt or conspire to prevent such employee from obtaining employment, or who shall, after the quitting of such employee, attempt or conspire to prevent such employee from obtaining employment.

The evident purpose of § 10 is to protect working men in their organizations, to prevent blacklisting of employees, and to make it unlawful to require a release from legal liability from injuries by the employer.

Section 10 of this Act has been very recently the subject of judicial construction in two cases, both decided in the Western District of Kentucky.[71] The first case, *United States* v. *Scott,* came up on demurrer to an indictment against Scott, who was the chief train dispatcher of the Louisville & Nashville Railroad, a corporation then engaged in interstate commerce. Scott had supervision and control of certain telegraph operators in the employment of the company, and was charged by the indictment with having threatened the operators with discharge if they joined a certain labor association, known as the "Order of Railroad Telegraphers," which was shown to be a corporation organized under the laws of the State of Iowa. JUDGE

[71] U. S. *v.* Scott (1906), Dist. Ct. W. D. Ky., EVANS, J., 148 Fed. 431; Order of R. R. Telegraphers *v.* Louisville & N. Ry. Co. (1906), Cir. Ct. W. Dist. Ky., EVANS, J., 148 Fed. 437.

EVANS, District Judge, in sustaining the demurrer to the indictment, placed his decision on the ground "that § 10 of the Act of June first, 1898, is not, in a constitutional sense, a regulation of commerce, or of commercial intercourse among the States, and cannot justly or fairly be so construed or treated, inasmuch as its essential object manifestly is only to regulate certain phases of the right of an employer to choose his own servants, whether the duties of those servants when employed relate to interstate commerce or not."

The second of the two cases, the *Order of R. R. Telegraphers* v. *Louisville & Nashville Railway Co.,* arose out of an attempt by the Order to secure an injunction restraining the Railway Company from discriminating against the agents of the Order who were attempting to secure members among telegraph operators in the railway's employment. A demurrer to the bill was sustained by JUDGE EVANS, sitting in Chancery in the Circuit Court, both on the ground of the unconstitutionality of the Act, as stated in *United States* v. *Scott,* and on the ground that the complainants had not by their bill brought themselves within the terms of the Act as employees, or "persons seeking employment."

It is not within the limits of this article to discuss at length the validity of this legislation. However, considering the objects to be accomplished it is in line with the exercise of authority over seamen by Congress. From the viewpoint of Congress as shown by this and similar legislation, organization among employees deserves encouragement, and the recognition by it of the necessity of dealing with employees as organized groups is apparent. The historical fact that the legislation in question was passed at a time when memory of labor disputes tying up a large portion of the railroads of the country engaged in interstate transportation[72] was fresh in the minds of all, indicate the view of Congress that an effectual method of securing immunity from disastrous strikes interrupting the transportation of the country was the security to employees of the right to belong to an organization or association of fellow employees, and to bargain in groups with their employers. The securing of such right to organize among men engaged in the difficult and hazardous occupation of transportation may reasonably be supposed to be an efficient means of beneficial regulation of commerce under the commerce clause of the Constitution.

In discussing the foregoing, the object has been to ascertain, if possible, how far the existing regulation is, in its general purpose, consistent with the legitimate exercise of the national power over

[72] Re Debs (1895), 158 U. S. 554; s. c. U. S. *v.* Debs, 64 Fed. 724.

commerce. An exhaustive examination of the cases would not come within the limits of this article, and only a brief reference to the more important legislation has been possible. Enough has been shown to indicate the general trend of the law showing the regulation of the relation of employer and employee engaged in commerce by water, and subsequent legislation affecting railway transportation.

That railroads are instrumentalities of commerce and their business commerce itself, has been established beyond question.[73] That in so far as they are doing a business interstate or foreign they are the public highways of the nation, is undisputed.[74] That their full regulation as to all matters pertaining to their business is within the controlling power of Congress must follow if the original purpose of the grant of commercial power is carried out.[75]

The statutes herein referred to must be regarded as a part of the general system of commercial regulations adopted by Congress for the benefit of the general public, the protection of the shipper, the traveling public, and of employees engaged in a difficult and hazardous occupation, whether they relate to employees engaged in transportation by water, or by railroad. The acts referred to should undoubtedly be interpreted *in pari materia* with the Interstate Commerce Act. They have a common general purpose, relate to the same general subject, and were all designed to regulate commerce national in its character and necessities so as to serve the interests of the nation as a whole. A broad principle of national policy finds expression therein.

By viewing the legislation discussed as a whole, it becomes apparent that no great or sweeping changes in the law have taken place. Constitutional principles do not change, but new conditions call for new applications of well known and long tried rules.

"The Constitution has not changed; the power is the same, but it operates today on modes of interstate commerce unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develope."[76]

CARL V. WISNER.

CHICAGO, April, 1907.

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[73] U. S. *v.* Trans-Missouri Freight Association (1892), 166 U. S. 30.

[74] Wabash R. Co. *v.* Illinois (1886), 118 U. S. 557.

[75] Interstate Commerce Com. *v.* Brimson (1894), 154 U. S. 447.

[76] JUSTICE BREWER in giving opinion of court in Re Debs (1895), 158 U. S. 664.